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**FICKLEN v. FREDERICKSBURG POWER CO., Inc., et al.**

June 15, 1922.

[112 S. E. 775.]

**1. Waters and Water Courses (§ 158 (2)\*)—Rights of Nonriparian Mill Held Limited to Contract Rights.**—The water rights, appurtenant to a mill which had never been riparian property, which rights were acquired by contracts with a riparian owner, who had constructed a dam in the stream, are limited to the rights granted by the contracts, regardless of the flow of water at the dam, or of the necessity for its use at the mill.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**2. Waters and Water Courses (§ 158 (2)\*)—Contracts Held to Give Mill Minimum Right of 50 Cubic Feet and Maximum Right of 90.**—Where the owner of a mill, who was entitled, under his contracts with the owner of a dam, which took a part of the water from a stream, to one-half of the first 45 cubic feet of water of the flow from the dam, to all of the next 40 cubic feet, and to one-half of the amount in excess of 85 cubic feet, and there was no evidence as to the flow of the water at the dam, made a contract with a corporation, which subsequently constructed a dam higher up the stream to take the entire flow thereof, whereby the company agreed to deliver to the mill its existing rights, estimated at sufficient amount to operate five pairs of stones at the minimum and nine pairs at the maximum, and the previous rights had been fixed on the basis of 10 cubic feet for each pair of stones, the mill was entitled under the subsequent contract to a minimum flow of 50 cubic feet, and to a maximum flow of 90, and it was not limited to the portions of the 85 cubic feet of flow specified in its original contract.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**3. Partition (§ 12 (1)\*)—Water Rights May Be Susceptible to Partition in Kind.**—There is nothing inherent in a water power right which prevents partition thereof in kind in a proper case.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 781.]

**4. Appeal and Error (§ 842 (2), 1022 (3)\*)—Finding on Conflicting Evidence Water Right Could Be Partitioned Not Disturbed.**—Whether a mill site and the water right appurtenant thereto were susceptible of partition in kind under the circumstances is a question of fact on which the finding of the commissioner, based on conflicting evidence that it could be partitioned, and the action of the trial court in overruling an exception to the report, will not be disturbed, unless the finding is clearly erroneous.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 609.]

**5 Waters and Water Courses (§ 156 (7)\*)—Provision Grantee**

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**Should Have Sufficient Water to Operate Certain Machinery Is Not Restriction on Place of Use.**—A provision in a grant for water power that the grantee should have sufficient water to turn a stated number of stones with the other necessary machinery is a limitation on the quantity of water to be taken, and not on the character or place of use.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**6. Waters and Water Courses (§ 156 (7)\*)—Grant of Water Power Rights Held Not to Restrict Place of Use.**—A grant of water power rights, by the owner of a flour mill to grantee, who proposed to erect a competing mill, of sufficient water to turn a designated number of stones at the grantee's mill, when construed with a subsequent contract recognizing the grantee's rights to use the water at his mill, or wherever else he may wish to use it, but providing against the use of any of the water on the grantor's former mill site, did not restrict the use of the water to the mill site purchased by the grantee at the time he acquired the water right.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**7. Waters and Water Courses (§ 156 (7)\*)—Grantee of Water Right Can Use It As He Chooses, in Absence of Restrictions.**—In the absence of specific restrictions in the grant of a water power right, the grantee may make such use of the water as he chooses, provided only that he does not thereby interfere with the rights of others.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**8. Waters and Water Courses (§ 156 (7)\*)—Grant Construed against Restriction to Particular Use.**—Wherever the wording of the deed makes it doubtful, whether a limitation of the quantity of water for power or a restriction of the use of the water power is contemplated, the courts will adopt the former construction.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

**9. Contracts (§ 186 (1)\*)—Contract against Use of Water on Particular Premises Cannot Be Enforced by Stranger Thereto.**—A contract between the owners of two mills using water power from the same dam, that none of the water should be used on designated premises, cannot be enforced by a stranger to the contract, who subsequently constructed a dam higher up the stream and agreed to furnish both mills with their water.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 457.]

Appeal from Circuit Court, Spotsylvania County.

Suit by Henry Warden against the Fredericksburg Power Company, Inc., and others, for partition, in which Ellen C. L. Ficklen, who had acquired the interests of the original complainant, was substituted as complainant. From a decree determining the extent of the water right of complainant, and directing a partition

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

in kind, complainant appeals. Reversed and remanded, with directions.

*John B. Minor*, of Richmond, and *W. D. Carter*, of Fredericksburg, for appellant.

*Alvin T. Embrey*, of Fredericksburg, for appellees.

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CHESAPEAKE & O. RY. CO. *v.* GAYLE.

June 15, 1922.

[112 S. E. 785.]

**1. Railroads (§ 350 (7)\*)—Giving Signals Held for Jury.**—In an action for injuries to an automobile at a crossing, whether defendant's agents gave the statutory signals held, from the evidence, for the jury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 143.]

**2. Appeal and Error (§ 1170 (9)\*)—Trial (§ 296 (3)\*)—Instruction in Action for Collision at Crossing A. uding to Speed of Train as Negligent Held Not Reversible Error in View of Other Instructions and Statute.**—In an action for injuries to an automobile, received at a crossing, an instruction which alluded to the rapid speed of the train as an act of negligence held not such error as to authorize a reversal in view of other instructions, and in view of Code 1919, §§ 6104, 6331, providing that error not affecting the substantial rights of the parties shall be ignored.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

**3. Negligence (§ 101\*)—Automobile Driver's Contributory Negligence Mitigates Damages for Injuries at Railroad Crossing.**—Under Code 1919, § 3959, where plaintiff's auto was damaged by defendant's train at a public highway crossing, the failure of defendant's agents to give the statutory signals required on approaching crossings entitles plaintiff to recover, though plaintiff was guilty of contributory negligence; such contributory negligence to be considered only in mitigation of damages.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

**4. Evidence (§ 5 (2)\*)—That Electric Automatic Devices Get Out of Order Is Matter of Common Knowledge.**—It is a matter of common knowledge that electrically operated automatic devices get out of order at times and fail to operate.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 631.]

Error to Circuit Court of City of Williamsburg and County of James Ctty.

Action by J. P. Gayle, trading under the firm name of the J. P. Gayle Supply Company, against the Chesapeake & Ohio Rail-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.